

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PHILLIP M. SMITH, JR.,

Plaintiff and Appellant,

v.

RUTH AFFLACK,

Defendant and Respondent.

B168337

(Los Angeles County  
Super. Ct. No. NC027936)

APPEAL from orders of the Superior Court of Los Angeles County,  
Arthur H. Jean, Judge. Affirmed.

Phillip M. Smith, Jr., in pro. per., for Plaintiff and Appellant.

Lorraine Anderson for Defendant and Respondent.

After a jury returned a verdict in favor of appellant Phillip M. Smith, Jr., on his complaint against respondent Ruth Afflack, the trial court denied Smith's request for a statutory award of attorney fees and for discovery sanctions. We affirm.

### **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

Smith, who is an attorney, initiated the underlying action in superior court on June 7, 2000. He initially represented himself, but eventually hired Joel F. Tamraz to represent him during discovery and the trial.

Smith's second amended complaint against Afflack and the Ruth Afflack Trust was filed on October 3, 2000. It alleged a pattern of misconduct by Afflack, Smith's landlord, with respect to his apartment in Long Beach, and contained claims for retaliatory eviction (Civ. Code, § 1942.5), breach of the implied covenant of good faith and fair dealing, breaches of warranty of habitability and the implied covenant of quiet enjoyment, infliction of emotional distress, abuse of process, and declaratory relief. Smith sought damages (including punitive damages), repairs to the apartment, and reasonable attorney fees (Civ. Code 1942.5, subd. (g)).

On June 18, 2002, a jury returned a verdict in Smith's favor, and awarded him \$3,750 in economic and noneconomic damages. Judgment was entered against Afflack and the Ruth Afflack Trust on November 14, 2002. Subsequently, by stipulation of the parties, the judgment was amended on March 12, 2003, to delete the reference to the Ruth Afflack Trust, which apparently was never served with process in the action.

In March 2003, Smith also filed motions for a new trial, an award of attorney fees, and discovery sanctions. Following a hearing, the trial court denied these motions on April 15, 2003. This appeal followed.

## DISCUSSION

Smith contends that the trial court improperly denied his request for (1) an attorney fee award and (2) discovery sanctions. As we explain below, he has failed to demonstrate error.

### A. Attorney Fees

Smith contends that he is entitled to an attorney award fee under Civil Code section 1942.5, subdivision (g), which states that “[i]n any action brought for damages for retaliatory eviction, the court *shall* award reasonable attorney’s fees to the prevailing party if either party requests attorney’s fees upon the initiation of the action.” (Italics added.) Citing the mandatory language of this provision, Smith argues that the trial court erred in denying a fee award, given his request for fees under the provision in the second amended complaint. We disagree.

When attorney fees are to be awarded pursuant to a statute, they are costs. (*Committee for Sewer Referendum v. Humboldt Bay Wastewater Authority* (1978) 77 Cal.App.3d 117, 125, fn. 7; see *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 264.) Under Code of Civil Procedure section 1033, if a plaintiff brings an unlimited civil action and recovers a judgment within the \$25,000 jurisdictional limit for a limited civil action, the trial court has the discretion to deny costs to the plaintiff.<sup>1</sup> (*Steele v. Jensen Instrument Co.* (1997)

---

<sup>1</sup> Subdivision (a) of Code of Civil Procedure section 1033 provides that “[c]osts or any portion of claimed costs shall be as determined by the court in its discretion in a case

59 Cal.App.4th 326, 330.) “In determining whether the prevailing party recovered a judgment that could have been rendered in a court of lesser jurisdiction, the trial court does not add a potential award of statutory or contractual attorney’s fees. [Citation.]” (*Id.* at p. 331.)

Here, Smith requested \$36,550 in fees incurred in connection with Tamraz’s representation. The trial court declined to award any attorney fees, citing its discretion under Code of Civil Procedure section 1033. It stated to Smith: “My view is that this is a case that could have been brought in small claims and should have been brought in small claims. If not, at the very most limited jurisdiction court. You didn’t. And in my view you should not receive either costs or attorney’s fees or any other rebate from [Afflack] in any way.”

Several courts have stated that the trial court has discretion to deny an attorney fee or cost award under Code of Civil Procedure section 1033, notwithstanding language in a pertinent statute *mandating* an award of fees or costs. (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815 [discretion over mandatory award of contract-based fees under Civ. Code, § 1717]; *Haworth v. Lira* (1991) 232 Cal.App.3d 1362, 1371 [discretion over mandatory award of fees and costs under Code Civ. Proc., § 1021.9]; *Dickens v. Lee* (1991) 230 Cal.App.3d 985, 988 [discretion over mandatory award of fees and costs under Civ. Code, § 1942.4].)

In a case close to point, *Dickens v. Lee, supra*, 230 Cal.App.3d 985, two tenants asserted claims for breach of the warranty of habitability and wrongful eviction against their landlord, and an arbitrator awarded them damages of \$2,500 and attorney fees “to be recovered as costs . . . limited to \$1,000.00.” (*Id.* at

---

other than a limited civil case . . . where the prevailing party recovers a judgment that could have been rendered in a limited civil case.”

pp. 986-987.) After judgment was entered on the arbitrator's award, the tenants submitted a costs memorandum seeking \$10,000 in attorney fees and \$351 in costs. (*Id.* at p. 987.) The trial court awarded \$1,000 in fees and costs. (*Ibid.*)

On appeal, the tenants contended that this award was incorrect under former Civil Code section 1942.4, subdivision (b), which stated that tenants who establish that their landlord demanded rent when habitability requirements were not met "shall be entitled" to an award of costs and reasonable attorney fees. (230 Cal.App.3d at p. 988.) The court in *Dickens* rejected this contention: "[A] costs award was *not* mandatory. Because the judgment was one that could have been rendered in municipal court, the award of costs was *discretionary*. [Citation.]" (*Ibid.*)

In view of *Dickens*, the trial court correctly determined that it had the discretion to deny Smith's fee request. Smith disagrees, citing *Rich v. Schwab* (1998) 63 Cal.App.4th 803, 818, in which the court held that a fee award under Civil Code section 1942.5, subdivision (g), was mandatory in a retaliatory eviction action. However, in *Rich*, the prevailing parties were a group of 423 tenants who recovered \$1.7 million in compensatory damages, and thus *Rich* did not implicate Code of Civil Procedure section 1033. (63 Cal.App.4th at pp. 808-809, 818.)

Smith also suggests that the trial court was required to award sanctions in view of the judgment, which provided that Smith was entitled to "costs of suit pursuant to Memorandum and reasonable attorney fees to be determined by noticed motion pursuant to Civil Code [section] 1942.5[, subdivision] (g) and other applicable statutes and case law." However, as we have explained, the trial court properly ruled on Smith's fee request in accordance with "applicable statutes and case law."

Finally, Smith has failed to provide a record adequate to establish that the trial court abused its discretion in denying his fee request. “A fundamental rule of appellate review is that “[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” [Citation.]” (*Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.) To overcome this presumption, appellants must provide an adequate record that demonstrates error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

In denying Smith’s fee request and other motions, the trial court indicated its familiarity with the evidence presented at trial and documents in the case files. However, the record before us lacks a reporter’s transcript of the trial and most of the case files. Accordingly, Smith has failed to overcome the presumption that the trial court properly exercised its discretion in denying his fee request.

#### B. *Discovery Sanctions*

Smith also contends that the trial court improperly denied his request for \$18,019.79 in discovery sanctions.

When a party engages in discovery misconduct, “[Code of Civil Procedure] [s]ection 2023, subdivision (b) permits (1) a monetary sanction, (2) an issue sanction, (3) an evidence sanction, (4) a terminating sanction or (5) a contempt sanction. . . . [¶] . . . [¶] In choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason. [Citation.]” (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244, first brackets added, quoting *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.)

In addition, under Code of Civil Procedure section 2033, subdivision (o), a party that fails to admit a matter pursuant to a request for admission may be subject to sanctions when the matter is ultimately proven to be true. This provision requires sanctions unless the trial court finds that enumerated circumstances were present, including that “the admission sought was of no substantial importance or the party failing to make the admission had reasonable grounds to believe it would prevail on the matter.” (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 198.)

Smith contends that he was entitled to sanctions under these provisions because Afflack did not respond properly to requests for admissions regarding documents and facts, thereby requiring him to send numerous meet-and-confer letters, and to file motions to compel. He further argues that as a result of Afflack’s inadequate discovery responses, he had to retain an expert witness and produce numerous exhibits at trial because Afflack denied every fact, almost every document and any liability up to her closing argument at trial.

Smith has failed to provide a record that establishes error here. Although the slim record before us includes his posttrial motion for discovery sanctions and its exhibits, he acknowledges in his appellate briefs that prior to trial, the trial court denied some of his discovery motions, and referred others to a judicial referee. The record lacks these motions and the related rulings, as well as a reporter’s transcript of the trial.

In view of these omissions, Smith has failed to overcome the presumption that the trial court properly denied sanctions either because Smith’s contentions had been addressed in prior motions that had been denied, or because it found that Afflack’s failures to admit fell within the exceptions to sanctions found in Code of Civil Procedure section 2033, subdivision (o). He has thus not demonstrated an

entitlement to sanctions under Code of Civil Procedure section 2033, subdivision (b), and section 2033, subdivision (o).

Smith suggests that the trial court erred by failing to explain its reasoning in denying discovery sanctions. However, as a general matter, the trial court is not required to specify its reasons in ruling on a request for discovery sanctions. (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261.)

Smith's reply brief also argues that the trial court improperly relied on Code of Civil Procedure section 1033 in denying his motion for discovery sanctions. Because this contention was not raised in Smith's opening brief, it is waived. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, pp. 647-648.)

However, even if we were to address this contention, we would not find error on the record before us. Generally, we will not reverse a ruling when the trial court's remarks suggest a misapprehension of law unless no proper basis exists for the ruling. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981.)

Here, the record discloses that after the trial court explained that the case was "a minor one" that should have been brought in small claims court, it tersely denied Smith's requests for attorney fees and "other sanctions" with a reference to its discretion under Code of Civil Procedure section 1033. We are not persuaded that these brisk remarks indicate that the trial court misapprehended the applicable standards for its decision, given that Smith's motion for discovery sanctions sets forth the standard for awarding sanctions under Code of Civil Procedure section 2033, subdivision (o). In any event, as we have explained, Smith has failed to show that there is no proper basis for the trial court's decision.

In sum, Smith has not demonstrated that the trial court erred in denying his motion for discovery sanctions.



**DISPOSITION**

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.